No. 508. Original

Brf. of Campbell for

(17,993.)

Office Supreme Court U.S.
FILED
FEB 23 1901
JAMES H. MCKENNEY,
Clerk.

Filed Feb. 23, 1901.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 508.

CASS FARM COMPANY, LIMITED; J. O. HARRIS, BRYANT WALKER, ET AL.,

Plaintiffs in Error,

vs.

CITY OF DETROIT, THE BOARD OF PUBLIC WORKS OF DETROIT, D. W. H. MORELAND, ET AL.

BRIEF OF HENRY M. CAMPBELL, COUNSEL FOR PLAINTIFFS IN ERROR.

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CASS FARM COMPANY, LIMITED; J. O. HARRIS, BRYANT WALKER, et al., Plaintiffs in Error. vs. CITY OF DETROIT, THE BOARD OF PUBLIC WORKS of Detroit, D. W. H. MORELAND, et al.	In Error to the Supreme Court of the State of Michigan.

BRIEF OF HENRY M. CAMPBELL, COUNSEL FOR PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

This case is brought to this Court from the Supreme Court of Michigan by writ of error, upon the ground that a constitutional question is involved. The question raised has also been passed upon by the Circuit Court of the United States for the Eastern District of Michigan. The decision of the State Court is in conflict with that of the United States Circuit Court Both cases are here submitted together.

The bill in the present case was filed to set aside and declare null and void proceedings taken by the Common Council of the City of Detroit to pave a portion of Second avenue in said city. The property where the improvement was to be made was outlying property, not built up, there being only three houses upon the street along the entire distance covered by the improvement. None of the property owners were in favor of having the street paved at the time when it was done, and substantially all of them protested against the proceedings and joined in the present suit. The pavement which was laid was an asphalt pavement upon a concrete foundation, of an expensive type,

and such as would be suitable in a thickly settled portion of a large city.

The proceedings were taken under the charter and ordinances of the city, the material provisions of which are as follows:

> Section 6, Chapter 11 of the City Charter: "That the Common Council shall not, in any one year, enter into contracts for the grading and paving of streets, alleys and public places, the cost of which will exceed in the aggregate $200,000.00, except upon the petition of the holders of the larger portion of the real estate directly abutting upon the portions of the street or alley proposed to be improved."
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> Section 34, Chapter 11, of the Charter: "For the purpose of such assessment, the lots and parcels of real estate situated on said street and fronting the portion thereof ordered to be improved, shall constitute one local assessment district, unless the Common Council, with the view to make the assessment more equal and just, shall subdivide the same into two or more assessment districts."
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> Section 35, Chapter 11, of the Charter: "The cost and expenses of such improvement, except so much thereof as shall be for the work within the lines of intersection of cross streets and alleys, and for cross walks at such intersections, and for repaving streets, avenues and highways, shall be assessed ratably, according to their extent of front on the lots, parts of lots or parcels of real estate directly fronting on and within the local assessment district; provided, that if the assessment made on any such lot or other parcel of land shall, by reason of its triangular or other irregular shape, seem to the Common Council to be inequitable, said council may direct a just portion of such assessment to be paid from the general road fund. * * * The word 'front,' as used in this act, shall be construed to mean that part of the lot or other parcel of land which directly abuts on that part of the street to be improved."
>
> Section 37, Chapter 11, of the Charter: "The board of assessors shall, when necessary, proceed to make out a list of all the lots or parcels of real estate, constituting a local assessment district as aforesaid, with the name of the owner or occupant of each lot or parcel of real estate, so far as said board can ascertain the same, and also the length of front of each lot or parcel of real estate fronting directly on such improvement. Such board shall then assess the cost and expenses of the work, chargeable as aforesaid upon the property in said list,

ratably upon the several lots and parcels of real estate, according to the length of front thereof. When the assessment roll is thus completed, said board shall give notice, by at least five publications in the city paper, that such roll is completed and will remain in their office for twelve days from the first publication of said notice, for the inspection of all concerned. At the expiration of said twelve days, said board shall, after any needful revision and correction of such roll, sign the same and report it to the Common Council. Said council may then confirm the same, or may, when it shall deem necessary, refer the same back to said board for further revision or corrections, and when the same shall be corrected to the satisfaction of said council, it shall, by resolution, confirm the same."

Section 1, Chapter 32, of the Revised Ordinances: "Streets or parts thereof may be ordered to be graded and paved by resolution of the Common Council, on motion of any member thereof, at a total cost to be expended in any one year not exceeding $200,000.00."

The other ordinances of the city provide for the letting of contracts for the performance of work, and the assessment of the cost. They nowhere provide for any notice at any stage of the proceedings, or any opportunity of being heard. The only provision for notice of any kind is found in Section 37, Chapter 11, of the Charter, above stated. The scope of this notice is considered hereafter.

In the present instance the paving was ordered by the Common Council under Section 6 of Chapter 11 of the Charter, and Section 1, Chapter 32, of the Ordinances, commonly known as the "forced paving clause." No one petitioned for the improvement. All of the persons upon whom the entire burden of the cost of the improvement was imposed protested against it. No opportunity was given them to be heard either as to the necessity, the character or the cost of the improvement; neither were they permitted to show whether or not a benefit would result to them by reason thereof, unless Section 37 of the Charter affords such an opportunity.

CONSTITUTIONAL QUESTIONS INVOLVED.

The constitutional questions involved may be stated as follows:

1. Is the rule of assessment prescribed by the charter and ordinances above stated such as to exclude any inquiry as to special benefits, and is its necessary operation, to the extent of the excess of the cost of improvement over any special benefits

accruing to the abutting property therefrom, to take private property for public use without compensation?

2. Is the exaction from the property owners, under the "forced paving clause" above referred to, of the entire cost of improvement without affording the property owners an opportunity of being heard at any stage of the proceedings, a taking of private property for public use without compensation and without due process of law?

CHARACTER OF THE TAX.

The first question for consideration is the character of the tax and the grounds upon which the power to levy the tax rests.

The authorities, at least all of the modern ones, are agreed that the tax does not fall within the category of general taxes and cannot be sustained upon the principles applicable to them.

"Special assessments are a peculiar species of taxation, standing apart from the general burden imposed for State and municipal purposes and governed by principles that do not apply generally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the person taxed, beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds, and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are supposed to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies."

Cooley on Taxation, 2nd Ed., 606.

"Assessments for the opening, making, improving or repairing of streets, the draining of swamps, and like local works, have generally been made upon property with some reference to the supposed benefits which the property would receive therefrom. Instead, therefore, of making the assessment in-

clude all the property of the municipal organization in which the improvement is made, a new and special taxing district is created, whose bounds are confined to the limits within which property receives a special and peculiar benefit in consequence of the improvement."

Cooley, Constitutional Limitations, 497.

"Special benefits to the property assessed, that is, benefits received by it in addition to those received by the community at large, is the true and only just foundation upon which local assessments can rest; and, to the extent of special benefits, it is everywhere admitted that the legislature may authorize local taxes or assessments to be made."

2 Dillon, Municipal Corporations, Secs. 761-763.

Brewer, J.: "Between taxes, or general taxes as they are sometimes called by way of distinction, which are the exactions placed upon the citizen for the support of the government, paid to the State as a State, the consideration of which is protection by the State, and special taxes or special assessments, which are imposed upon property within a limited area for the payment for a local improvement supposed to enhance the value of all property within that area, there is a broad and clear line of distinction, although both of them are properly called taxes, and the proceedings for their collection are by the same officers and by substantially similar methods. Taxes proper, or general taxes, proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute, and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes which have for their object the welfare of all. * * *

"On the other hand, special assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring property, that property should pay for the improvement."

Illinois Cent. R. R. vs. Decatur, 147 U. S., 197.

"It is generally agreed that an assessment levied without regard to actual or probable benefits is unlawful as constituting an attempt to appropriate private property to public uses."

Thomas vs. Gain, 35 Mich., 162.

"To permit individuals to be taxed to pay for a public improvement to the extent of the peculiar benefit which they receive from such improvement, is not unjust or inequitable; but any exaction beyond this, exclusively from such individuals, is an act which involves the ability on the part of the community to confiscate, for its own purposes, the property of the citizen."

Tidewater Company vs. Coster, 18 N. J. Eq., 531.

Further citation of cases is unnecessary. The distinction between general and special taxes is universally conceded. The only theory upon which a special tax or assessment can be sustained is that the property against which it is levied is enhanced in value by the improvement, and that a charge to the extent to which the property is benefited by the improvement imposes no burden upon it.

In this respect there is no difference in principle between a tax or assessment for the cost of opening a street and a tax or assessment for the cost of improving a street already opened.

Cooley on Taxation, 2nd Ed., 611-612.
Bauman vs. Ross, 167 U. S., 593.
Kansas City vs. Smart, 128 Mo., 294.

METHOD OF DETERMINING THE QUESTION OF BENEFIT.

It being conceded that the right to levy special assessments cannot be attributed to the power of the legislature to impose general taxes, but rests solely upon the ground that a benefit commensurate with the cost results from the improvement, a vital question arises as to the method of determining the extent of the benefits as a measure of the amount which can be locally assessed against the property receiving the improvements.

This question has given rise to endless discussion in the courts and an infinite variety of opinion.

The want of harmony among the cases is largely due to a failure to discriminate between the exercise of power which is legislative in its nature and that which is judicial or quasi-judicial.

The legislature, in the exercise of its legislative functions, has no right to assess or levy taxes of any kind. It can prescribe the rules under which taxes are levied by persons or bodies duly empowered to act for the purpose. The action of the legislature in prescribing the rules is one thing; the exercise of the power conferred is of another and entirely different

nature. The legislature may declare the rules under which special assessments may be laid. The action of the body authorized to levy the tax is of a different character and subject to different considerations. The one is legislative; the other is judicial or quasi-judicial. The one declares the law; the other carries the law so declared into effect. The legislative power is limited, however, by the restriction that it shall not prescribe such rules as cannot be carried into effect without the destruction of individual rights guaranteed by the constitution.

Many of the earlier cases hold that the power of the legislature to make special assessments is unlimited, and that when such power has been exercised, it cannot be inquired into, but is conclusive.

Other cases, while holding that the right to make special assessments rests upon the benefits conferred by the improvements authorized, say that the question of the extent of the benefit is one of legislative discretion, to be determined by the legislative body, its determination being conclusive, even though in advance.

Still other cases decide that the question, being one of fact, can only be determined by a tribunal in possession of information of the precise case to be passed upon, and that the party to be affected has a constitutional right to be heard before he is concluded by the decision of the taxing body which deprives him of his property.

This confusion of opinion has finally resolved itself into two entirely distinct lines of decisions, which are absolutely irreconcilable.

(a) One line of cases, while conceding that the power to assess rests upon the benefit conferred, proceeds upon the theory that the question of the amount to be assessed because of such benefit is one of legislative expediency.

The leading case upholding this doctrine is *People vs. Brooklyn*, 4 N. Y., 419. This case holds that the making of a local assessment is an exercise of the power of taxation vested in the general government, and that the discretion of the legislature in determining the persons against whom the assessment shall be levied is without limitation, and, having been exercised, cannot be inquired into.

See also cases cited, 25 *American & English Encyclopedia of Law*, 496-506.

(b) The other line of cases above referred to asserts the doctrine that the legislative power is not unlimited, and that assessments must be apportioned by some rule capable of producing reasonable equality, and that a rule which imposes a burden in excess of the actual benefits received is an arbitrary

exaction which it is beyond the power of the legislature to make.

"It is admitted that the legislature may prescribe the rule for the apportionment of benefits, but it is not conceded that its power in this regard is unlimited. The rule must at least be one which it is legally possible may be just and equal as between the parties assessed. If it is not conceivable that the rule prescribed is one which will apportion the burden justly, or with such proximate justice as is usually attainable in tax cases, it must fall to the ground, like any other merely arbitrary action which is supported by no principle."

Thomas vs. Gain, 35 Mich., 162.

The Supreme Court of Massachusetts, in speaking of local assessments, says: "It is well established that taxation of this kind is permissible under the constitution of this commonwealth and under the constitution of the United States, only when founded upon special and peculiar benefits to the property from the expenditure on account of which the tax is laid, and then only to an amount not exceeding such special and peculiar benefits."

Sears vs. Street Commissioners, 173 Mass., 352.

"The legislature, in the plenitude of its taxing power, cannot have constitutional power to exact from one citizen, or even one county, the entire revenue of the commonwealth. Such an exaction, by whatever name the legislature might choose to call it, would not be a tax, but would undoubtedly be the taking of private property for public use, and which could not be done constitutionally without the consent of the owner, without retribution of the value in money."

Hammett vs. Philadelphia, 65 Pa. St., 152.

"In a government in which the legislative power is not omnipotent, and in which it is a fundamental axiom that private property cannot be taken without just compensation, the existence of an unlimited right in the law making power to concentrate the burden of a tax upon specified property, does not exist. * * * It follows, then, that these local assessments are justifiable on the ground above, that the locality is especially to be benefited by the outlay of the money to be raised. Unless this is the case, no reason can be assigned why the tax is not general. An assessment laid on property along a city street for an improvement made in another street, in a distant part of the same city, would be universally condemned, both on moral and legal grounds; and yet there is no difference between such

an extortion and the requisition upon a land owner to pay for a public improvement over and above the exceptive benefit received by him."

State vs. Newark, 37 N. J. Law, 415.

"When the money of the few is taken for the benefit of the whole, it is in substance the exercise of despotic power. It is justice when an equivalent is given. In the case of a local improvement there is an equivalent for the assessment when it only equals the special benefit to the property benefited."

Barnes vs. Dyer, 56 Vermont, 469.

The condition of the law prior to the decision in the case of *Norwood vs. Baker* is summed up in 2 *Dillon, Municipal Corporations*, Section 761, as follows:

"Special benefits to the property assessed, that is, benefits received by it in addition to those received by the community at large, is the true and only just foundation upon which local assessments can rest, and, to the extent of the special benefit, it is everywhere admitted that the legislature may authorize local taxes or assessments to be laid.

"When not restrained by the constitution of the particular State, the legislature has a discretion, commensurate with the broad domain of the legislative power, in making provision for ascertaining what property is specially benefited and how the benefit shall be apportioned.

"This proposition, as stated, is nowhere denied; but the adjudged cases do not agree upon the extent of the legislative power. The courts which have followed the doctrine of the leading case in New York have asserted that the authority of the legislature in this regard is quite without limits; but the decided tendency of the later decisions, including those of the courts of New Jersey, Michigan and Pennsylvania, is to hold that the legislative power is not unlimited, and that these assessments must be apportioned by some rule capable of producing reasonable equality, and that provisions of such a nature as to make it legally impossible that the burden can be apportioned with proximate equality are arbitrary exactions and not an exercise of legislative authority."

THE QUESTION IS SETTLED BY NORWOOD VS. BAKER, 172 U. S., 269.

The inexorable logic of this decision makes clear the following propositions:

The question of benefits is one of fact.

It is not within the purview of legislative power to determine facts.

If the legislature assumes to decide a question of fact, it acts, if it has any right to act at all, in a semi-judicial, and not in a legislative capacity. Its finding is an adjudication, and the power can only be effective when exerted in conformity with the safeguards which, under our system of government, hedge about the exercise of judicial power.

This case decides the following points:

1. "The principle underlying special assessments upon private property to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and, therefore, that the owners do not in fact pay anything in excess of what they receive by reason of such improvement."

2. "The exaction from the owner of private property of the cost of the public improvement in substantial excess of the special benefits accruing to him, is, to the extent of such excess, a taking, under the guise of taxation, of private property, for public use, without compensation."

3. A rule of assessment of benefits by the front foot is arbitrary, and its necessary operation is to exclude any inquiry as to special benefits.

The decision in this case is conclusive of the question at issue, and should put an end to all controversy on the subject.

Some contention has been made that this decision is not consistent with the earlier decisions of this Court. Even if such were the case, it would not detract from the authority of the later decision. An examination of the cases referred to shows, however, that the claim is without foundation. In each of the cases which are referred to as being inconsistent with *Norwood vs. Baker*, the statute under which the assessment was made provided the property owner with an opportunity of being heard, and the assessing body was empowered in proper cases to change the assessment whenever the facts shown warranted such a course. This Court was particular in each case to rest its decision upon this fact.

In *Davidson vs. New Orleans*, 96 U. S., 97, the Court holds that it is due process of law, within the meaning of the con-

stitution, when the statute requires that the fixing of a tax or assessment, before it becomes effectual, must be submitted to a court of justice, *with notice to the owners of the property, all of whom have the right to appear and contest the assessment.*

In *Spencer vs. Merchant*, 125 U. S., 345, it is held: "If the legislature of a State, in the exercise of its power of taxation, directs the expense of laying out, grading or repairing a street to be assessed upon the owners of lands benefited thereby, and determines the whole amount of the tax and what lands which might be so benefited are in fact benefited, *and provides for notice to and hearing of each owner at some stage of the proceedings*, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law, in violation of the fourteenth amendment to the constitution of the United States."

In *Walston vs. Nevin*, 128 U. S., 578, the Kentucky statute authorizing assessments for the cost of opening and improving streets was under consideration, and it was held that the act did not deprive the owners of their property without due process of law, and was not repugnant to the fourteenth amendment to the constitution of the United States. In speaking of the act, the Court says: "Unjust, unequal or arbitrary burdens are not authorized to be imposed by the terms of the act, *and opportunity is given to every party interested to be heard in opposition to the enforcement of the liability in the courts*, which are specifically authorized to make all corrections, rules and orders to do justice to all parties concerned."

In *Fallbrook Irrigation District vs. Bradley*, 164 U. S., 112, it is held: "Due process of law is furnished and equal protection of the law given in such proceedings, when the course pursued for the assessment and collection of taxes is that customarily followed in the State, *and when the party who may be charged in his property has an opportunity to be heard.*" It was made the duty of the assessing board, after hearing, to determine which lands would be benefited and which would not be benefited by the proposed improvement.

There is no decision of this Court prior to *Norwood vs. Baker*, which holds that an arbitrary rule of assessment made in advance, which does not provide for a hearing and furnishes no power in the assessing officer of changing or modifying the assessment, is valid or constitutional.

It is because of the absence of this opportunity of being heard and the want of power to make an assessment conform to the fact of benefit, that the Court, in *Norwood vs. Baker*, finds that the rule of assessment is arbitrary.

NORWOOD VS. BAKER IS SOUND IN PRINCIPLE.

Laying aside for the moment consideration of the conclusive character of the decision in *Norwood vs. Baker*, and the importance of adhering to the doctrine of *stare decisis*, there can be no doubt of the logical soundness of the conclusions reached and announced in that case.

It is now conceded, by modern cases at least, that the right to make local assessments rests upon the ground of special and peculiar benefit received by individuals, beyond that received by the public generally. It is obvious, therefore, that such right can only be supported to the extent to which benefits are conferred. The question is one of fact, and is an individual one in each instance. Its solution depends upon the peculiar circumstances of each case, and it cannot, from the nature of the subject, be decided in advance. Each individual has a right to be heard upon the proposition whether or not he is benefited by a particular improvement and to what extent, and he has a further right to be heard before a tribunal which is possessed of power to modify or change the assessment according to the facts shown. It is a question of private right, and to deny the right to be heard is to refuse the protection of the law. In one case the improvement might result in benefit to abutting property owners equal to or greater than the cost. In another the benefit might be slight although the cost might be great. The truth can only be ascertained by a consideration of the facts and circumstances by a tribunal informed of such facts and circumstances.

Under our system of government, the legislature, in the exercise of its legislative powers, cannot deprive any individual of his property without compensation and due process of law. The legislature can enact laws and lay down general rules for the making of local assessments and providing for assessing the costs against persons specially and peculiarly benefited. But these rules must be such that the person affected has an opportunity of being heard as to the question of benefits; and a rule which does not afford such opportunity, and does not also guard against assessment in excess of the actual benefits received, is arbitrary and void.

"Due process of law is a restraint on the legislative, as well as on the executive and judicial powers of the government."

Murray's Lessee vs. Hoboken Land & Improvement Co. 18 How., 276.
Ulman vs. Baltimore, 72 Md., 592.

"Due process of law is not confined to judicial proceedings. It extends to every case which may deprive the citizen of life, liberty or property, whether the proceeding be judicial, legislative or executive in its nature."

Weimer vs. Bunbury, 30 Mich., 201.
Davidson vs. New Orleans, 96 U. S., 97.
Dietz vs. Neenah, 91 Wis., 428.
Cooley, Constitutional Limitations, 355.

"An act of the legislature arbitrarily taking property for the public good and fixing the compensation to be paid, could not be upheld. It would in such case be the absence of that due process of law which both the Federal and State constitutions guarantee to every citizen. * * * The legislature can no more arbitrarily impose an assessment for which property may be taken and sold than it can render a judgment against a person without a hearing."

Stuart vs. Palmer, 74 New York, 191.
Remsen vs. Wheeler, 105 New York, 573.
In re Union College, 129 New York, 308.

"Due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard and to defend, enforce and protect his rights. A hearing, or an opportunity to be heard, is absolutely essential. We cannot conceive of due process of law without this. In his argument in the Dartmouth College case, Webster defines due process of law as 'a proceeding which proceeds upon inquiry and renders judgment only after trial.'"

Campbell vs. Dwiggins, 83 Ind., 482.

The tribunal charged with the duty of determining the benefits to be assessed, whether it be the legislature itself, if it can act at all, or a body specially designated for the purpose, does not act in a legislative, but in a semi-judicial capacity in reaching its conclusions. It seems entirely clear that the legislature is exceeding its powers if it attempts to determine in advance, as a fact, without any information as to any particular case, that in all cases in the future, whenever a street in a city is paved or otherwise improved, no matter whether in the outskirts or in its most densely populated portion; no matter what kind of pavement is laid or what its cost, or what the necessity of the improvement may be, each individual abutting property owner will in fact receive a benefit which is exactly proportionate to the frontage of his property abutting upon the portion of the street paved, whether the depth of the property be one foot or one thousand, and regardless of other considerations.

"Where the legislature has submitted these questions for inquiry to a commission or to official persons to be appointed under municipal ordinances or regulations, the inquiry becomes in its nature judicial, in such a sense that the property owner is entitled to a hearing or to notice or an opportunity to be heard."

Parsons vs. District of Columbia, 170 U. S., 52.

The Supreme Court of Michigan, in a case in which it is held that an assessment to pay the cost of construction of a sewer, levied according to the superficial area of the lots, without regard to actual or probable benefits, is unlawful, in discussing the subject, says: "But as new legislation will probably be procured, it seems proper to declare in this case that parties whose property is to be taken under summary tax proceedings are entitled as of right to be heard at some stage in the proceedings, before the tax shall become an established charge against them or their property."

Thomas vs. Gain, 35 Mich., 164.

In a similar case in Massachusetts it is said: "It is also contended by the petitioners that the statute gives owners of property no opportunity of being heard upon their liability to assessment. It is well established that the determination of the amount of taxes for special benefits to real estate by any tribunal to which the legislature delegates the power, is a quasi-judicial proceeding, which cannot take final effect unless persons to be assessed have opportunity to be heard."

NORWOOD VS. BAKER HAS GENERALLY BEEN FOLLOWED BY THE COURTS.

In every instance since the decision above mentioned, where the question has arisen in the Federal courts, the rule announced in *Norwood vs. Baker* has been followed.

Loeb vs. Trustees of Columbia Tp., 91 F. R., 37 (W. D. of Ohio).

A paving case where the statute provided for the assessment of the entire cost on abutting property by front foot.

This case has recently come before this Court, and was disposed of upon other grounds than those stated in *Norwood vs. Baker*. The holding of the Court is that even if one section of the act authorizing assessments is invalid, that does not render the entire act void, and that bonds authorized by valid portions of the act can be sustained.

21 Supreme Court Reporter, 181.

Fay vs. Springfield, 94 F. R., 409 (W. D. of Missouri).

A paving case where the assessment was according to the front foot.

Charles vs. City of Marion, 98 F. R., 166 (Dist. of Indiana).

Also a paving case. This Court holds: "It is essential to due process of law that there shall not only be notice of a time and place for a hearing, but, what is more important, that there shall be a tribunal clothed with power, by methods and rules prescribed by law, to hear and determine the question involved."

Same case, 100 F. R., 538.

On final hearing, the rule above announced was reaffirmed, and it was further held that a notice of hearing to revise and correct a report and estimate of the engineer, to make the report conform to the prescribed basis of assessment, was not a notice of hearing as to the question of benefits.

Lyon vs. Tonawanda, 98 F. R., 361 (N. D. of New York).

A paving case which follows the rule of *Norwood vs. Baker*.

Cowley vs. City of Spokane, 99 F. R., 840 (E. D. of Washington).

A paving case following the rule of *Norwood vs. Baker*.

Parker vs. Detroit, 103 F. R., 357 (E. D. of Michigan).

Paving case in which the same provisions of the charter of the City of Detroit are involved as in the case at bar.

Bidwell vs. Huff, 103 F. R., 362 (S. D. of Georgia).

A paving case following *Norwood vs. Baker*.

Many of the State courts have also approved of the doctrine of *Norwood vs. Baker* and adopted it as the correct rule in such cases.

Hutcheson vs. Storrie, 92 Tex., 685.

In this case, on the authority of *Norwood vs. Baker*, the Supreme Court of Texas reversed a long line of decisions in that State holding a contrary rule.

Sears vs. Street Commissioners, 173 Mass., 350.
Adams vs. City of Shelbyville, 57 N. E. R., 114.
McKee vs. Pendleton, 57 N. E. R., 532.
Dexter vs. Boston, 57 N. E. R., 379.

In some of the State courts, where the question has arisen, the rule of *Norwood vs. Baker* is recognized, but it is held that the statutes involved contain such provisions for notice as to bring them within the principle of the decision.

Schroeder vs. Overman, 55 N. E. R., 158.
Adams vs. City of Shelbyville, 57 N. E. R., 114.
McKee vs. Town of Pendleton, 57 N. E. R., 532.
State vs. District Court, 83 N. W. R., 182.

In four instances the State courts have refused to follow the rule.

In the case at bar, the Supreme Court of Michigan say: "We should feel inclined to follow the opinion of the Supreme Court of the United States in *Norwood vs. Baker*, *supra*, inasmuch as it was based upon the fourteenth amendment to the constitution of the United States, if that were a paving case; but that was a street opening case, and until that court shall pass upon the question in the exact form in which it is here presented, we shall feel bound to follow our own decisions."

Cass Farm Co. vs. Detroit, 7 Detroit Legal News, 283.

The Supreme Court of Missouri has declined to follow the rule of *Norwood vs. Baker* in two recent decisions.

In one case, where an an assessment was levied according to area for the cost of a sewer, the Court says that the facts were different in the case before them, and that the decision in *Norwood vs. Baker* was by a divided Court, and was in conflict with the prior rulings of the Court.

Herman vs. Allen, 57 S. W. R., 559.

In a paving case, where the assessment was by the front foot under provisions of a charter affording no opportunity for a hearing, the same Court says: "It is, however, insisted that the Norwood-Baker case does condemn this front foot rule because it affords no opportunity for a hearing. Still, conceding, as we do, *that there were expressions to this effect in that opinion*, it seems clear to us that the opinion was not predicated upon want of notice. * * * We do not believe that the Supreme Court intended to lay down the law that a State statute imposing taxes must necessarily and in all cases give notice and a hearing to the taxpayer before it can be held valid."

Barber Asphalt Paving Co. vs. French, 58 S. W. R., 939.

The Supreme Court of North Dakota declined to follow the rule, upon the ground that the court does not believe that the Supreme Court of the United States intended to lay down so broad a rule.

Webster vs. City of Fargo, 82 N. W., 732.

The latter cases seem to be the only ones in which the doctrine of *Norwood vs. Baker* has been questioned since it was decided.

THE RULE OF THE DETROIT CHARTER IS CLEARLY ARBITRARY.

Section 35, Chapter 11 of the Charter provides: "The cost and expenses of such improvement * * * shall be assessed ratably according to their extent of front on the lots, parts of lots or parcels of real estate directly fronting on and within the local assessment district."

Section 37 provides "that the board of assessors shall then assess the cost and expenses of the work chargeable as aforesaid upon the property in said list ratably upon the several lots and parcels of real estate, according to the length of front thereof."

No latitude is permitted the assessors. It makes no difference whether they consider any particular lot benefited by the improvement or not. In all cases and under all circumstances the assessment must be pro rata according to the frontage.

It is said, however, that Section 37 provides for a notice. The provision referred to is that after the assessments have been made according to frontage, and the assessment roll completed, "said board shall give notice, by at least five publications in the city paper, that such roll is completed and will remain in their office for twelve days from the first publication of said notice, for the inspection of all concerned. At the expiration of said twelve days said board shall, after any needful revision and correction of said roll, sign the same and report it to the Common Council. Said council may then confirm the same, or may, when it shall deem necessary, refer the same back to said board for further revision or corrections; and when the same shall be corrected to the satisfaction of said council, it shall by resolution confirm the same."

This certainly is not an opportunity to show what benefits would result from the improvement, in order that the assessment may conform to the benefits received. The intention is plain that the purpose of the notice is to correct clerical errors

in the roll. If names are wrong, or measurements, these things can be corrected. This is the extent of the provision. The assessors know no other law than to arbitrarily assess the cost of the improvement according to the frontage, regardless of the question of benefits.

The United States Circuit Court of Indiana, in considering a similar claim of notice, says: "It is suggested in argument that the notice and hearing above provided for is such notice and hearing as constitute due process of law. The statute is mandatory in requiring the engineer to make his assessment and estimate upon the basis of assessing the whole cost of the improvement by the front line measurement; and as he is an officer acting under special delegated statutory authority, an assessment or estimate made by him on any other basis than that prescribed by the statute would be void. The matter referred to the consideration and judgment of the common council and its committee is the assessment and estimate so made by the engineer, and nothing else, and the only authority conferred upon the common council or a committee of that body is either to adopt that estimate, or else simply to make alterations in the estimate so made. Evidently the alterations contemplated are simply such alterations as are necessary to make the estimate of the engineer conform to the statute prescribing the method by which the engineer shall be governed in making the estimate. The statute does not purport to confer authority upon the common council to institute an inquiry *de novo*, and to hear witnesses and consider testimony for the purpose of fixing the assessment on the basis of the actual benefits received by the property of the land owner by the construction of the public improvement. * * * It is not sufficient, to constitute due process of law, that the statute provides for a hearing and notice. It is essential to due process of law that there should not only be notice of a time and place for a hearing, but, more important, that there should be a tribunal clothed with power by methods and rules prescribed by law to hear and determine the question involved."

Charles vs. City of Marion, 98 F. R., 166.
Same case, 100 F. R., 538.
Fay vs. Springfield, 94 F. R., 409.
Barnes vs. Dyer, 56 Vermont, 469.

It is difficult to imagine a case where individual rights have been disregarded to a greater extent than in the case disclosed by this record. The territory where the improvement was made was unsettled. No property owner asked for the pavement. The Common Council, of its own motion, ordered the improvement and directed that a pavement suitable for the most densely populated portion of the city should be laid. The contract was let against the repeated vetoes of the mayor. The

pavement was laid in midwinter, in extremely cold weather, and outside of the time prescribed by the charter, and at no stage of the proceedings did any of the persons upon whom the entire cost of the improvement was imposed, have any voice in the matter. When such high-handed and arbitrary action is taken, the persons affected have the right to the full protection of every rule of law.

It is respectfully submitted that the judgment of the Supreme Court of Michigan should be reversed.

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